

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
DURHAM DIVISION

In re:

**Bryan Steven Autry and
Crystal Gale Autry,**

Bankruptcy Case No.: 09-80303

Soc. Sec. Nos. xxx-xx-8823 & xxx-xx-3165
Mailing Address: 212 Hemlock Drive, , Durham,
NC 27705-

Debtors.

**Bryan Steven Autry and
Crystal Gale Autry,**

A.P. No.: _____

Plaintiffs,

National City Mortgage/National City Bank,
Defendant.

**COMPLAINT OBJECTING TO CLAIM
AND TO DETERMINE VALIDITY OF LIEN**

The Plaintiffs, above-named, respectfully allege as follows:

1. That this matter is a core proceeding pursuant to 28 U.S.C. § 157, and that the court has jurisdiction pursuant to 28 U.S.C. §§ 151, 157 and 1334.
2. This Complaint was filed, pursuant to 11 U.S.C. § 506, and in accordance with Bankruptcy Rule 7001, to value their residence for the purpose of determining the secured status of the mortgage claim held by National City Mortgage/National City Bank.
3. The Plaintiffs are filed this bankruptcy case on February 24, 2009, seeking protection under Chapter 13 of Title 11 of the United States Code.
4. The Defendant National City Mortgage/National City Bank is a corporation and/or a partnership with an office and principal place of business located at Bankruptcy Detpartment, 3232 Newmark Drive, Miamisburg, OH 45342-. This Court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. §§ 157 and 1334 and 11 U.S.C. § 506.
5. The Plaintiffs own real property located at 202 Hemlock Drive, Durham, NC 27705.
6. National City Mortgage/National City Bank asserts that it holds a Deed of Trust on such property with a payoff balance, as of the date this case was filed in the amount of

approximately \$78,475.28.

7. The fair market value of the said property is not greater than \$87,119.00.
8. Pursuant to 11 U.S.C. 501(a) of the Bankruptcy Code , on or about march 16, 2009, the Defendant filed a Proof of Claim in the Plaintiff's bankruptcy case.
9. That the Proof of Claim Is not in compliance with the requirement of Bankruptcy Rule 3001(d), as it is not "accompanied by evidence that the security interest has been perfected."
10. Further, that the Proof of Claim is not in compliance with Bankruptcy Rule 3001©), as it is based on a writing, but no copy of either the original or duplicate of such writing was included with the Proof of Claim nor was a statement of the circumstances of the loss or destruction of the writing included.
11. That as a result of this failure to attach evidence that the security interest has been perfected, or the writing upon which the claim is based, the Proof of Claim and Amended Proof of Claim should not be an allowed secured claim.
12. Pursuant to 11 U.S.C. 506 (d) such claim is not being disallowed:
 1. Pursuant to 11 U.S.C. § 502(b)(5), which relates to debts that are unmaturred on the date of filing and are excepted from discharge under 11 U.S.C. § 523(a)(5);
 2. Pursuant to 11 U.S.C. § 502(e), which relates to claims for reimbursement or contribution of an entity that is liable with the debtor or has secured the claim of a creditor; nor
 3. Due only to the failure of any entity to file a Proof of Claim under 11 U.S.C. § 501.
13. In turn, pursuant to 11 U.S.C. 506(d), the lien securing said loan is void.

WHEREFORE, the Plaintiff prays the Court find that said claim held by National City Mortgage/National City Bank, which is secured by a lien upon said property, to be void, and that said claim should therefore be classified an unsecured claim for the purpose of this Chapter 13 case. The Plaintiff further prays that the Court order National City Mortgage/National City Bank to cancel the said lien forthwith. The Plaintiff additionally prays that the attorney for the Plaintiff be awarded attorneys fees to be paid from the assets of the estate pursuant to 11 U.S.C. § 330(a)(4)(B) and that the Court grant such other and further relief as to the Court seems just and proper.

Dated: January 12, 2010

LAW OFFICES OF JOHN T. ORCUTT, P.C.

/s Edward Boltz

Edward Boltz

Attorney for the Plaintiffs

North Carolina State Bar No.: 23003

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